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FREEDOM OF INFORMATION ACT REQUEST

Regional Freedom of Information Officer
U.S. EPA, Region 9
75 Hawthorne Street (OPA-2)
San Francisco, CA 94105
(415) 947-4251

Re: Freedom of Information Act Request for Arizona Regulation and Maricopa County Submissions to the Arizona State Implementation Plan.

Dear FOIA Officer,

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, Earthrise Law Center, on behalf of the Save Tonopah, Oppose Poultry Plant, Inc. ("STOPP"), requests copies of public records in the custody of the Environmental Protection Agency ("EPA"), as identified below. STOPP is a local non-profit working to reduce air pollution problems, particularly from stationary sources in Maricopa County, Arizona. STOPP's mission includes working to inform the local community of potential violations of air pollution laws, gaps in local air pollution laws, and participation in all aspects of local air pollution control and regulation so as to ensure the community's concerns are represented. As part of its advocacy, STOPP is requesting the records described below in furtherance of its organizational mission and its work in Tonopah, Arizona.

Documents Requested

Requests for EPA records are governed by EPA's FOIA. 40 C.F.R. Part 2, subpt. A. Pursuant to these regulations, STOPP requests the below enumerated documents relating to the approval of and incorporation into an Implementation Plan for the State of Arizona under the Clean Air Act, section 110, 42 U.S.C. § 7410. This Implementation Plan is codified at 40 C.F.R. § 52.120. This request includes:

1. Arizona Air Pollution Control Administrative Rules and Regulation Article **R9-3-101**, entitled "Definitions" as incorporated by reference into Maricopa County Air Pollution Control Regulation, Rule 21.0, section D.1, adopted July 9, 1984, "Procedures for Obtaining an Installation Permit," approved and incorporated into

the Arizona State Implementation Plan at 53 Fed. Reg. 30,224, 30,234–35 (Aug. 10, 1988) (restored following vacatur at 56 Fed. Reg. 3,219, 3,220 (Jan. 29, 1991) (codified at 40 C.F.R. § 52.120(c), Table 4);

2. Letter from Maricopa County Department of Health Services, Division of Public Health, dated April 28, 1988, committing to administer the New Source Review provisions of their regulations consistent with EPA's requirements, as approved and incorporated into Arizona's State Implementation Plan at 53 Fed. Reg. 30,224, 30,234–35 (Aug. 10, 1988) (restored following vacatur at 56 Fed. Reg. 3,219, 3,220 (Jan. 29, 1991) (codified at 40 C.F.R. § 52.120(e), Table 1);

This request applies to those documents as approved and incorporated into the current State Implementation Plan for Arizona. To save resources and mailing expense, STOPP requests electronic copies of these documents if available.

Finally, STOPP respectfully requests that EPA include in its response an explanation of which document, if any, may be privileged or exempt from this FOIA request. If EPA claims that the records should not be disclosed, please justify its refusal by referring to the specific exemption that you are invoking under the FOIA. 5 U.S.C. § 552(b); 40 C.F.R. § 2.104. If there are no responsive documents to any one of STOPP's requests, please indicate that in your written response. STOPP reserves the right to appeal any denial.

Fee Waiver Request

STOPP also hereby requests a waiver of fees for costs incurred in locating and duplicating these materials, pursuant to 5 U.S.C. § 552(a)(4)(iii), because disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” “FOIA is to be liberally construed in favor of waivers for noncommercial requesters.” *Jud. Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *see also Env'tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 947 (9th Cir. 2005); 132 Cong. Rec. 27,190 (1986) (Statement of Sen. Leahy). Following is a response to the fee waiver requirements set out in 40 C.F.R. § 2.107(l)(1) and (l)(2)(i)-(ii).

I. Whether the subject of the requested records concerns “the operations or activities of the government.”

Here, STOPP's request for disclosure of the above information directly relates to the operations and activities of the federal government because the records comprise part of the State of Arizona's Implementation Plan under the federal Clean Air Act, which on approval by EPA and incorporation into the Code of Federal Regulations became part of the federal law of air pollution control. *See e.g. Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992).

II. Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.

Disclosure of the requested information is likely to contribute to public understanding of the operations or activities of EPA with respect to administration of the federal Clean Air Act and oversight of State’s programs to comply with federal air standards. The requested information will specifically enable STOPP, its members, and interested members of the public to be more fully informed of the regulatory programs employed by Maricopa County to comply with the federal Clean Air Act and reach attainment of the National Ambient Air Quality Standards.

Although nominally included in the Code of Federal Regulations, and thus ostensibly in the public domain, the requested records are incorporated by reference into the CFR, *see* 40 C.F.R. 52.120(b)(1) (*citing* 5 U.S.C. § 552(a)), and not available in the public domain as approved by EPA. Although EPA Region 9 previously maintained a copy of Arizona’s State Implementation Plan, that page never contained an accessible version of the documents requested and more recently EPA has removed online access to any Region 9 State Implementation Plans. *See* “Approved Air Quality Implementation Plans in Region 9,” <https://www.epa.gov/air-quality-implementation-plans/approved-air-quality-implementation-plans-region-9?ReadForm&count=2000&state=Arizona&cat=Maricopa+County-Agency-Wide+Provisions> (last visited Jan. 17, 2018).

The requested records are not in the public domain. Because the records comprise part of the implementation of federal air pollution regulation in Arizona, disclosure of these records is likely to contribute to an understanding of the government’s activities.

III. Whether the disclosure of the requested information will contribute to “public understanding.”

Disclosure of the requested information will significantly contribute to the understanding of a reasonably broad audience of interested persons because this information will aid in the understanding of ongoing state and local administration of federal air pollution laws, and the state and local regulation of local stationary sources that cause or contribute to air pollution at a local level affecting all persons in the air quality control region. Furthermore, disclosure of these documents will contribute to public understanding because STOPP is uniquely qualified to disseminate this type of information to the relevant local community. STOPP has been actively engaging in ongoing local air pollution concerns and regularly distributes information to its members, supporters, and other stakeholders in the community. STOPP uses social media, its website, in person meetings, email, newsletters, and other mailings to communicate with the public. STOPP’s work in the local community and expertise on the issues relating to local air pollution regulation and continued commitment to local engagement on the issue ensures that release of this information would contribute to public understanding of the applicable local regulations, and how local regulation impacts the current state of local air pollution.

IV. Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

The disclosure of the requested information will contribute significantly to the public understanding, because it will aid in transparency and dissemination of locally applicable regulations, and their interpretation that is not otherwise available to or well understood by the local community. Courts have held that the factor of whether the disclosure will contribute “significantly” to the public understanding is satisfied where the information requested is new, would supplement information currently available to the public, or add to the public oversight of the government’s activities. *See e.g. McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir.1987); *Judicial Watch of Florida v. U.S. Justice Dept.*, 1998 U.S. Dist. LEXIS 23441, at *8 (D.D.C. 1998). Moreover, courts have held that if it is a “close call” as to whether a requestor has met one of the factors, in light of Congressional intent that the fee waiver provision be liberally construed, a non commercial entity should be given the benefit of the doubt and be granted the fee waiver. *Forest Guardians v. Dept. of the Interior*, 416 F. 3d 1173 (10th Cir. 2005).

The requested information has not, to the best of STOPP’s knowledge, been released to the public and, therefore, qualifies as new. *Or. Natural Desert Ass’n v. U.S. Dept. of Interior*, 24 F. Supp. 2d 1088, 1095 (D. Or. 1998) (agency information supporting a public agency action, but which had not been released publicly, was new for the purposes of FOIA fee waiver). EPA’s website contains none of the requested information, nor is the information published in the Code of Federal Regulations, or published by the relevant state or local authorities. The requested information is therefore new. Because the requested documents comprise part of the regulatory scheme for local air pollution control and enforcement, as approved by the federal government, disclosure of these documents will necessarily add to the public’s understanding of the federal government’s oversight activities. Further, Release of the records requested will contribute to the ability of nonprofit public interest oversight organizations such as but not limited to STOPP to advocate for improvements in regulatory programs intended to reduce local air pollution. It will also contribute to the ability of STOPP and others to oversee the activities of the EPA, and state and local agencies, with regard to regulatory actions that are intended to address local problems of air pollution. As discussed above, STOPP participates in local permitting actions, petitions seeking EPA oversight of locally administered permit programs and in community organizing related to air pollution. In doing so, STOPP also shares documents and information with other supporters and organizations that engage in similar activities. STOPP will also disseminate the information to organizations through websites, meetings, memoranda, and direct sharing of the records as appropriate. Only by understanding the full scope of federally approved local and state regulations can STOPP meaningfully participate in its public oversight function and assist other community members and organizations to do the same.

V. Whether STOPP Has any Commercial Interest in Disclosure.

STOPP has no commercial interest in the requested records. STOPP has no mechanism to obtain funds from the use of the records, does not promote the records or analysis of them as a commercial concern, and its website contains no links to commercial interests.

STOPP is a non-profit public interest organization working to address local air pollution problems in Maricopa County, Arizona. Therefore, the considerations of 40 C.F.R. § 2.107(l)(1) with regard to the possible commercial interests of STOPP do not apply because STOPP has no commercial interests and will realize no commercial benefit from the release of the requested information or as a result of any subsequent analysis or use of the records sought.

Rather, STOPP's primary interest is to inform the public of the relationship between the relevant federal, state, and local regulatory agencies in controlling and reducing local air pollution. Therefore, here, STOPP's primary interest in disclosure is a public interest.

Conclusion

Earthrise Law Center is representing STOPP for the purposes of this FOIA request. As provided by FOIA, 5 U.S.C. § 552(a)(6), we trust that we shall receive a reply to this request within twenty business days of receipt. Thank you for your time and attention in this matter, and we look forward to hearing from you shortly. If you have any questions, feel free to contact Kathryn Roberts at Earthrise Law Center, by email at kathryn@lclark.edu or by phone at (503) 768-6654.

Sincerely,

/s/ Kathryn Roberts

Kathryn Roberts

Counsel for Save Tonopah Oppose Poultry Plant, Inc.